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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 \* \* \*

7 UNITED STATES OF AMERICA,

Case No. 2:16-cr-00046-GMN-PAL

8 Plaintiff,

9 v.

**ORDER**

10 MELVIN D. BUNDY, et al.,

(*Ex Parte* Mot. for Subpoena – Dkt. #420)

11 Defendants.

12 This matter is before the Court on Defendant<sup>1</sup> Melvin D. Bundy's *Ex Parte* Motion for  
13 Subpoena (Dkt. #420), filed May 16, 2016. This Motion is referred to the undersigned pursuant  
14 to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 and 1-7 of the Local Rules of Practice.

15 **BACKGROUND**

16 A federal grand jury returned a Superseding Criminal Indictment (Dkt. #27) on March 2,  
17 2016, charging Mr. Bundy with 14 counts of the following offenses: conspiracy to commit an  
18 offense against the United States, in violation of 18 U.S.C. § 371; conspiracy to impede or injure  
19 a federal officer, in violation of 18 U.S.C. § 372; use and carry of a firearm in relation to a crime  
20 of violence, in violation of 18 U.S.C. § 924(c); assault on a federal officer, in violation of 18  
21 U.S.C. § 111(a)(1) and (b); threatening a federal law enforcement officer, in violation of 18  
22 U.S.C. § 115(a)(1)(B); obstruction of the due administration of justice, in violation of 18 U.S.C.  
23 § 1503; interference with interstate commerce by extortion, in violation of 18 U.S.C. § 1951; and  
24 interstate travel in aid of extortion, in violation of 18 U.S.C. § 1952. Additionally, Mr. Bundy is  
25 charged in all five forfeiture allegations.

26  
27 <sup>1</sup> Defendant represents that his true name is Mel Dallen Bundy. *See* Minutes of Proceedings (Dkt. #143).  
28 For the purposes of this Order, all references to "Mr. Bundy" shall refer to Mel Dallen Bundy a/k/a  
Melvin D. Bundy.

1 On March 4, 2016, Mr. Bundy made an initial appearance before Magistrate Judge David  
2 K. Duncan in the United States District Court for the District of Arizona pursuant to Rule 5(c)(3)  
3 of the Federal Rules of Criminal Procedure. *See* Rule 5(c)(3) Docs. Received (Dkt. #102). He  
4 waived his right to an identity hearing in Arizona and was committed to the District of Nevada.  
5 *Id.* On March 16, 2016, Mr. Bundy made his initial appearance in this district and was appointed  
6 counsel to represent him. *See* Mins. of Proceedings (Dkt. #143). The Court granted defense  
7 counsel's request a continuance of the proceeding to allow Mr. Bundy to review the Superseding  
8 Indictment and to prepare for the detention hearing. *Id.* On March 21, 2016, the Court arraigned  
9 Mr. Bundy on the Superseding Indictment and detained him pending trial. *See* Mins. of  
10 Proceedings (Dkt. #164); Order of Detention (Dkt. #197). Trial in this matter is currently set for  
11 February 6, 2017. *See* Case Management Order (Dkt. #321).

12 The Superseding Indictment (Dkt. #27) resulted from a series of incidents that occurred  
13 in and around Bunkerville, Nevada, in April 2014. The Government alleges that the 19  
14 Defendants planned, organized, conspired, led, and/or participated as gunmen in a massive  
15 armed assault against federal law enforcement officers all in order to threaten, intimidate, and  
16 extort the officers into abandoning approximately 400 head of cattle owned by Defendant Cliven  
17 D. Bundy ("Cliven Bundy"). Law enforcement officers acted pursuant to three orders issued by  
18 a federal court to seize and remove the cattle from federal public lands based on Cliven Bundy's  
19 refusal to obtain the legally-required permits or pay the required fees to keep and graze his cattle  
20 on the land.

21 The Superseding Indictment further alleges that a removal operation began on April 5,  
22 2014, and on April 12th, Defendants along with hundreds of recruited "followers" executed a  
23 plan to recover the cattle by force, threats, and intimidation. Defendants and their followers  
24 demanded that officers leave and abandon the cattle, threatening to use force if the officers did  
25 not do so. Armed gunman took sniper positions behind concrete barriers and aimed their assault  
26 rifles at the officers. Defendants and their followers outnumbered the officers by more than 4 to  
27 1 and the potential firefight posed an obvious threat to the lives of the officers as well as  
28 unarmed bystanders and children. Thus, the officers were forced to leave and abandon the cattle.

1 After this confrontation, the leaders and organizers of the conspiracy organized armed security  
 2 patrols and checkpoints in and around Cliven Bundy's Bunkerville ranch to deter and prevent  
 3 any future law enforcement actions against Cliven Bundy or his coconspirators and to protect his  
 4 cattle from future removal actions.

5 The *ex parte* Motion (Dkt. #420) seeks issuance of a subpoena to Round Mountain Gold  
 6 Company, which employed Mr. Bundy during the relevant time period in this case, in order to  
 7 obtain his employment records:

8 Any and all records regarding the employment of Melvin D. Bundy. Such records  
 9 to include, but not limited to, are the following: employment file, timekeeping  
 10 records, disciplinary records, reports, pay stubs, personnel files, and any other  
 records in your possession related to Mr. Bundy's employment at Round  
 Mountain Gold Company.

11 See Proposed Subpoena (Dkt. #420-1). In the sealed *ex parte* application, defense counsel  
 12 explains why the records are pertinent to, and may be used in Mr. Bundy's defense.

### 13 **DISCUSSION**

#### 14 **I. APPLICABLE LAW**

##### 15 **A. Rule 17 of the Federal Rules of Criminal Procedure**

16 Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas in  
 17 criminal proceedings. See, e.g., *United States v. Sellers*, 275 F.R.D. 620, 622 (D. Nev. 2011).  
 18 Rule 17 establishes the process by which federal courts can issue subpoenas duces tecum for the  
 19 production of evidence before trial. Rule 17(c) governs the production of documents and objects  
 20 and provides:

21 A subpoena may order the witness to produce any books, papers, documents, data,  
 22 or other objects the subpoena designates. The court may direct the witness to  
 23 produce the designated items in court before trial or before they are to be offered  
 in evidence. When the items arrive, the court may permit the parties and their  
 attorneys to inspect all or part of them.

24 Fed. R. Crim. P. 17(c)(1). Rule 17(b) describes the procedure for defendants who are unable to  
 25 pay the requisite witness fees and permits an *ex parte* application by a defendant requesting that  
 26 the court issue a subpoena. The court will authorize issuance of a subpoena to a defendant who  
 27 is unable to pay "if the defendant shows an inability to pay the witness's fees and the necessity of  
 28 the witness's presence for an adequate defense." Fed. R. Crim. P. 17(b). "Although prior

1 judicial authorization is required, the *ex parte* nature of a Rule 17(b) application serves to put a  
 2 defendant on equal footing with the Government because the Government is not required to give  
 3 a defendant notice as to those witnesses that it intends to subpoena to testify at trial.” *United*  
 4 *States v. Reyes*, 162 F.R.D. 468, 469 (S.D.N.Y. 1995).

5 Unlike a subpoena issued under Rule 17(a) or 17(b) to compel a witness to appear at trial,  
 6 the district court has discretion to direct that a subpoena duces tecum be made returnable *before*  
 7 trial. *United States v. Lieberman*, 608 F.2d 889 (1st Cir. 1979); *United States v. Murray*, 297  
 8 F.2d 812 (2nd Cir. 1962); *United States v. Parker*, 586 F.2d 422 (5th Cir. 1978). However, Rule  
 9 17 is not a discovery device. *United States v. Nixon*, 418 U.S. 683, 689 (1974), *superseded by*  
 10 *statute on other grounds*, Fed. R. Evid. 104(a), *as recognized in Bourjaily v. United States*, 483  
 11 U.S. 171, 179 (1987); *see also United States v. LaRouche Campaign*, 841 F.2d 1176, 1179 (1st  
 12 Cir. 1988); *United States v. Fletcher*, 461 F. Supp. 2d 1101, 1102 (D. Ariz. 2006) (“Subpoenas  
 13 issued pursuant to Rule 17(c) are not discovery devices and may not be used to expand the scope  
 14 of Rule 16.”); *United States v. Shinderman*, 232 F.R.D. 147, 150 (D. Me. 2005); *United States v.*  
 15 *Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954) (“to construe Rule 17 as a discovery rule would render  
 16 Rule 16 nugatory and meaningless and would defeat its limitations”). Rule 17(c) may, however,  
 17 be used to obtain evidentiary materials. *See Nixon*, 418 U.S. at 699–700.

#### 18 **B. Good Cause Standard for Pretrial Production**

19 The burden is on the party seeking production to show good cause for the production  
 20 before trial. *United States v. Beckford*, 964 F. Supp. 1010, 1022 (D. Va. 1997). In *United States*  
 21 *v. Iozia*, 13 F.R.D. 335 (D.C.N.Y. 1952), the district court formulated a standard for establishing  
 22 good cause for production prior to trial by requiring a showing:

- 23 (1) That the documents are evidentiary and relevant;
- 24 (2) That they are not otherwise procurable by the defendant reasonably in  
advance of trial by exercise of due diligence;
- 25 (3) That the defendant cannot properly prepare for trial without such  
production and inspection in advance of trial and the failure to obtain such  
26 inspection may tend unreasonably to delay the trial;
- 27 (4) That the application is made in good faith and is not intended as a general  
fishing expedition.

28 *Id.* at 338. Many federal courts have generally followed the *Iozia* test for establishing good

1 cause for pretrial production. *See, e.g., Nixon*, 418 U.S. at 699; *Sellers*, 275 F.R.D. at 623;  
 2 *United States v. Stein*, 488 F. Supp. 2d 350, 366 (S.D.N.Y. 2007).

3 In *Nixon*, the Supreme Court held that the party seeking pretrial production bears the  
 4 burden of establishing relevancy, admissibility, and specificity. *Id.* at 700. The burden is on the  
 5 party seeking the subpoena “to show the evidentiary nature of the requested materials with  
 6 appropriate specificity.” *United States v. Skeddle*, 178 F.R.D. 167, 168 (N.D. Ohio 1996).  
 7 Conclusory allegations of relevance and admissibility are insufficient. *United States v. Eden*,  
 8 659 F.2d 1376, 1381 (9th Cir. 1981). It is not enough that the documents requested in a Rule  
 9 17(c) subpoena duces tecum may have some potential of relevance and evidentiary use. *United*  
 10 *States v. Burger*, 773 F. Supp. 1419, 1425 (D. Kan. 1991). Rather, there must be a sufficient  
 11 likelihood that the requested material is relevant to the offenses charged in the indictment, and  
 12 the moving party must make a sufficient preliminary showing that the requested material  
 13 contains admissible evidence regarding the offenses charged. *Nixon*, 418 U.S. at 700.

#### 14 **C. *Ex Parte* Applications for Pretrial Production**

15 Rule 17(b) allows an *ex parte* application by a defendant unable to pay for an order  
 16 compelling a witness to appear. *See Sellers*, 275 F.R.D. at 624. Rule 17(c), however, does not  
 17 contain any language allowing an *ex parte* application for pretrial production by a defendant  
 18 without financial means. *Id.* Courts are split as to whether a party may make an *ex parte*  
 19 application for a pretrial subpoena duces tecum, and the Ninth Circuit has not ruled upon the  
 20 issue. *Id.* (collecting cases and legal treatises and discussing rationale for and against). This  
 21 Court agrees with those courts which have found that an indigent defendant should be permitted  
 22 to make an *ex parte* application for pretrial production of documents and a subpoena may be  
 23 issued under limited circumstances, such as (i) where identification of the source of evidence  
 24 potentially imperils the source or integrity of evidence; (ii) where notice of a subpoena duces  
 25 tecum would compromise defense counsel’s trial strategy; or (iii) where a constitutional interest  
 26 of a defendant is implicated. *Id.*

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1     **II.     ANALYSIS**

2             The Court finds that Mr. Bundy has met his burden under *Iozia* of establishing the need  
3     for pretrial production of the materials described in the proposed subpoena to Round Mountain  
4     Gold Company. He has also met his burden of showing relevancy, admissibility, and specificity  
5     for the requested information. Producing the records in advance will avoid delaying the trial  
6     while counsel reviews what may prove to be voluminous records. However, Rule 17(c)(1) does  
7     not authorize issuance of a subpoena duces tecum requiring pretrial production of documents to  
8     counsel's office. Because the proposed subpoena would require pretrial production directly to  
9     the office of defense counsel, the Court will not issue the proposed subpoena in its current form.  
10    Instead, the Court will order the documents to be produced to the Clerk of the Court, who will  
11    notify counsel for both sides when the documents are received that they are available for  
12    inspection and copying.

13            None of the limited circumstances to justify an *ex parte* subpoena are apparent in the  
14    Motion (Dkt. #420). Rule 17(c)(1) plainly provides that "[t]he court may direct the witness to  
15    produce the designated items in court before trial or before they are to be offered in evidence"  
16    and "may permit the parties and their attorneys to inspect all or part of them." Mr. Bundy is not  
17    entitled to pretrial production of evidentiary materials without notice or disclosure to opposing  
18    counsel. While the Motion may remain sealed because it discloses defense strategy, the  
19    subpoena itself does not, and will not be sealed. Counsel for Mr. Bundy does not claim that the  
20    source or integrity of any potential evidence or that any other constitutionally protected interest  
21    of Mr. Bundy would be imperiled by disclosure of the subpoena to opposing counsel. Although  
22    the Court finds good cause for the Motion to remain *ex parte* and under seal, *see Sellers*, 275  
23    F.R.D. at 624; *Reyes*, 162 F.R.D. at 470 ("There are strong policy reasons in favor of an *ex parte*  
24    procedure."), the Court finds no justification for an *ex parte* subpoena for pretrial production of  
25    records.

26            To comply with Rule 17, the Court will direct issuance of a subpoena directing the  
27    custodian of records to produce the designated items to the Clerk of the Court by June 27, 2016.  
28    Upon receipt of the documents, the Clerk shall make the documents available for inspection and

1 copying to counsel for Mr. Bundy and the government prior to trial. The Court will also allow  
2 the cost of process, fees, and expenses for the subpoena to be paid as if subpoenaed on behalf of  
3 the government.

4 Accordingly,


5 **IT IS ORDERED:**

- 6 1. Defendant Melvin D. Bundy's *Ex Parte* Motion for Subpoena (Dkt. #420) is  
7 GRANTED, and shall remain under seal.
- 8 2. The Clerk of the Court shall issue a subpoena, conforming to the Court's instructions,  
9 and deliver a copy of this Order and the subpoena to the U.S. Marshal for service.
- 10 3. The U.S. Marshal shall serve the subpoena and a copy of this Order to Round  
11 Mountain Gold Company via facsimile at (775) 655-0093.
- 12 4. The Round Mountain Gold Company shall produce and forward records responsive to  
13 the subpoena by **June 27, 2016**, along with a copy of this Order, to:

14 Clerk of Court  
15 United States District Court for the District of Nevada  
16 333 Las Vegas Blvd., South  
Las Vegas, Nevada 89101

- 17 5. Upon receipt of the records, the Clerk of Court shall notify counsel for both parties  
18 that they are available for inspection and copying.
- 19 6. The cost of process, fees, and expenses for the subpoena shall be paid as if  
20 subpoenaed on behalf of the government, the Court being satisfied that Defendant  
21 Melvin D. Bundy is financially unable to pay the fees and expenses.

22 Dated this 27th day of May, 2016.

23   
24 PEGGY A. LEEN  
25 UNITED STATES MAGISTRATE JUDGE  
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